

Service Discrediting: Misuse, Abuse, and Fraud in the Government Purchase Card Program

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Opportunity often creates a thief or an abuser of a government program.¹

I. Introduction

Sergeant (SGT) Andrews has been a government purchase cardholder for two years. Recently tasked with organizing a unit function, he decided to use the card for a number of questionable purchases, including food and alcohol. His rationale in making the purchases was, "I don't remember exactly what you can or can't buy with the card, but I'm doing it for the unit. I'll just accomplish the mission first and ask forgiveness later if I have to."

Specialist (SPC) Benton had been a government purchase cardholder for only six months when she ran into personal financial problems and began using her card to buy a number of items that she then sold or pawned. Among the items SPC Benton pawned were a laptop computer and a personal digital assistant (PDA), both of which should have been placed on the unit property book. Over the next few months, she began purchasing not only work-related items, but merchandise with no military use at all, such as expensive clothing and jewelry. Specialist Benton stopped recording her purchases in her log as required, and worse yet, her approving official (AO) continued approving her purchases each month without reviewing the account statements.

Sergeant First Class (SFC) Calhoun works in a recruiting battalion, and has held a government purchase card (GPC) for over a year. His brother owns an office supply store near post. One year after obtaining the card, SFC Calhoun concocted a scheme with his brother to defraud the government. He used his card to make a number of fictitious purchases, and his brother created a series of phony invoices to cover the non-existent transactions. The two men divided the proceeds of their nefarious enterprise after the government paid the charges. Seven months into the scheme, SFC Calhoun's supervisor, who was also his AO, confronted him about the suspicious activity, demanding that he produce the thousands of dollars worth of office equipment that he had supposedly purchased, but which had never been seen by anyone in the recruiting station.

Though his scheme was exposed, SFC Calhoun was undaunted; he revealed what he had been doing and offered his supervisor, "some of the action" provided he not disclose the misconduct. The supervisor agreed, and continued approving the fraudulent purchases. Losses to the government now exceed \$100,000.

While these stories are fictitious, each is an example of misconduct that has occurred within the Department of Defense's (DOD) GPC program. Like many government programs, the GPC program was conceived with the best intentions, but it spawned a variety of unforeseen opportunities for misconduct. While the DOD will continue the program, in large part because the savings outweigh the losses,² the need for stronger program controls, more effective responses to misconduct, and better preventive measures against future misconduct have been the subject of intensive study.

This article begins with an overview of the GPC program, including its origin, its training requirements, and its management structure. Next, GPC misconduct will be divided into three categories: misuse, abuse, and complex fraud. The research will then focus on government responses to GPC misconduct, particularly the complexities of military prosecutions. The article then briefly addresses defenses and preventive measures, including a proposed panel instruction to simplify prosecution under the Uniform Code of Military Justice (UCMJ).

II. Origin of the Government Purchase Card Program

The DOD's GPC program is a component of the government-wide commercial purchase card program, implemented to streamline government procurements by providing a convenient and efficient means of making small purchases with minimal administrative requirements.³ By eliminating the paperwork requirements of the purchase order, the GPC saves the government about twenty dollars per transaction, and saved the DOD an estimated \$900 million between 1994 and 2003.⁴ The GPC is now the required method of purchasing goods under the micro-purchase limit⁵ and is the mandatory means of payment for services obtained from the Defense Automated Printing Service (DAPS).⁶ Although the term "IMPAC" has, in many quarters, become synonymous with the GPC program, it

1. United States v. Girardin, No. 98-0391, 1998 CAAF LEXIS 1587 (1998) (Sullivan, J., concurring) (commenting on the appellant's misuse of a government-issued credit card).

2. See U.S. GEN. ACCT. OFF. REP. NO. GAO-04-156, *Purchase Cards: Steps Taken to Improve DOD Program Management, but Actions Needed to Address Misuse* (Dec. 2003) [hereinafter GAO-04-156].

3. See U.S. GEN. ACCT. OFF. REP. NO. GAO-04-87G, *Audit Guide: Auditing and Investigating the Internal Control of Government Purchase Card Programs* (Nov. 2003) [hereinafter GAO-04-87G].

is an acronym for the International Merchant Purchase Authorization Card, a registered trademark of US Bank, which provided VISA credit card services to the Army, Air Force, and Defense Agencies until 1998.⁷ In the future, IMPAC may recede from the military lexicon. In November 1998, the General Services Administration's (GSA) SmartPay program replaced the IMPAC as the federal government's charge card program.⁸ In fiscal year (FY) 2002, the DOD reported that an estimated 207,000 cardholders used purchase cards to make about eleven million transactions, at a cost of nearly seven billion dollars. In December 2003, the GSA reported that the DOD used purchase cards for nearly eleven million transactions, valued at about \$6.8 billion, representing forty-five percent of the federal government's FY 2002 purchase card activity.⁹

III. Structure of the Government Purchase Card Program

A. Key Personnel and Their Responsibilities

All DOD personnel may be cardholders;¹⁰ eligibility is not restricted by rank. The DOD GPC program has a six-level supervisory hierarchy, organized as follows: (1) the DOD; (2) the military service; (3) the major command; (4) the installation/organization coordinator; (5) the billing (approving) official; and (6) the cardholder.¹¹ Of the program's six tiers, levels

four through six are most relevant to legal practitioners in the field.

The installation or organization coordinator is the fourth level supervisor, whose primary responsibilities include implementing and administering the program at the local level. This official trains, monitors, and audits GPC use at the installation level, and serves as the liaison between the major command, the bank, the Defense Finance and Accounting Service (DFAS), and installation organizations.¹²

The approving or billing official's primary responsibilities include approval or disapproval of all purchases after reconciliation by the cardholder, ensuring fund accountability, property accountability, certification of invoices, and surveillance of all cardholders within that AO's account.¹³ The AO is usually the cardholder's supervisor or in the cardholder's chain of command, but if not, must have the capability to influence the cardholder's performance rating.¹⁴ Unless exempted from the role by the Under Secretary of Defense for Contracting, the AO must also be the billing certifying officer for all account holders within his or her purview.¹⁵ Thus, the AO must certify that all transactions made by the cardholder are legal, and within administrative and fiscal guidelines.¹⁶ In July 2001, the DOD mandated a ratio of no more than seven cardholders to a billing official as the program standard,¹⁷ although the total number of transactions must be considered when determining an acceptable cardholder to billing-official ratio.¹⁸ The Deputy Assistant

4. Tanya N. Ballard, *Defense Beefs Up Purchase Card Oversight*, GOV. EXECUTIVE MAG., DAILY BRIEFING, Jan. 2003, available at <http://govexec.com/dailyfed/0103/010303t1.htm>.

5. See U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 213.270 (July 31, 2000) [hereinafter DFARS].

6. See GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 5113.270 (Feb. 2002) [hereinafter FAR].

7. U.S. DEP'T OF DEFENSE, PURCHASE CARD CONCEPT OF OPERATIONS (Mar. 31, 2003), available at <http://purchasecard.saalt.army.mil/Concept%20of%20Operations%20R1%20March%2003.pdf> [hereinafter PURCHASE CARD CONCEPT OF OPERATIONS] (noting that Citibank provides credit card services to the Navy and Marine Corps); see also DOD CHARGE CARD TASK FORCE FINAL REPORT 2-1 (June 27, 2002), available at http://www.dod.mil/comptroller/Charge_Card_TF_Final.pdf [hereinafter TASK FORCE FINAL REPORT].

8. See U.S. GENERAL SERVS. ADMIN., GOVERNMENT CHARGE CARDS OVERVIEW, available at http://www.gsa.gov/Portal/gsa/ep/contentView.do?contID=8930&contentType=GSA_OVERVIEW (last visited Feb. 8, 2004) [hereinafter U.S. GENERAL SERVS. ADMIN.] (explaining the SmartPay program issues the purchase card through five different banks: (1) Bank of America; (2) Bank One; (3) Citibank; (4) Mellon Bank; and (5) US Bank).

9. *Id.*

10. See U.S. DEP'T OF ARMY, GOVERNMENT PURCHASE CARD STANDING OPERATING PROCEDURE (July 31, 2002), available at <http://purchasecard.saalt.army.mil/Concept%20of%20Operations%20R1%20March%2003.pdf> [hereinafter ARMY SOP].

11. *Id.* at 3-4.

12. *Id.*

13. *Id.*

14. *Id.*

15. PURCHASE CARD CONCEPT OF OPERATIONS, *supra* note 7, at 5.

16. *Id.*

17. ARMY SOP, *supra* note 10, at 5.

Secretary for Procurement of the applicable defense agency must approve requests that exceed the seven-to-one ratio.¹⁹

The cardholder is primarily responsible for safeguarding the card, making only authorized purchases, maintaining a purchase log of all transactions (by using purchase receipts and invoices), and reconciling the log with the AO's records.²⁰ At a minimum, the purchase card log must contain: the date of purchase; the vendor name; the transaction's dollar amount; a description of items or services ordered; and an indication of whether or not they were received.²¹

B. Training Requirements

The Defense Federal Acquisition Regulation mandates standardized training for all purchase card users.²² To fulfill this need, a self-paced, DODGPC Tutorial is available on the Defense Acquisition University (DAU) Website.²³ Designed primarily for prospective cardholders and AOs, the ten-part training program has a series of exams throughout the course and a final exam on which the user must achieve seventy percent or better to receive a certificate of completion. The program has an estimated completion time of four hours.²⁴

The DAU training program includes a section titled, "Unauthorized Use of the GPC," which details the general prohibitions against the following: (1) split purchases and split requirements;²⁵ (2) purchases for other than official purposes; and (3) purchases for travel-related expenses. The section also includes advisories for requirements needing special approval,

such as food purchases and short-term room rentals. The lesson also provides several examples of purchase card fraud. The comprehensive training outlines the dispute process, lists the persons to whom GPC misconduct should be reported, and details the order in which they should be contacted.²⁶

In addition to the DAU, the GSA has a training course on its website. Training on the GSA site, however, is divided into two courses, one for cardholders and one for agency or organization program coordinators. The GSA site's cardholder training is geared for forty-five minutes, and includes its own exit quiz.²⁷

In addition to online sources, local installations may offer their own GPC training programs. Judge advocates serving as trial counsel or defense counsel should consider attending such training, or at a minimum, should obtain the training materials, which could be extremely valuable at trial, particularly when the government alleges dereliction of duty.²⁸

C. Fiscal Controls

1. Authorized Purchases

Cardholders may make purchases in person, by telephone, or online,²⁹ provided their purchases are authorized. Cardholders are thus subject to DOD mandates, their individual service regulations, and any applicable internal office policies. The general rule of all GPC transactions, however, is that cardholders may only make purchases to fulfill legitimate governmental needs.³⁰

18. *Id.*

19. Memorandum, Assistant Secretary of Army, Acquisition Logistics and Technology Army Contracting Agency, to Assistant Secretary of the Army (Acquisition, Logistics and Technology), Assistant Secretary of the Navy (Research, Development and Acquisition), Assistant Secretary of the Air Force (Acquisition), Directors, Defense Agencies, subject: Cardholder to Approving Official Span of Control (17 Dec. 2002) (on file with author).

20. ARMY SOP, *supra* note 10, at 4.

21. PURCHASE CARD CONCEPT OF OPERATIONS, *supra* note 7, at 12.

22. DFARS, *supra*, note 5, at 213.301.

23. Defense Acquisition University, available at http://clc.dau.mil/kc/no_login/portal.asp [hereinafter DAU Training Site] (last visited Feb. 8, 2004).

24. *Id.*

25. FAR *supra* note 6, at 13.301(c); *see also* note 38, *infra*.

26. DAU Training Site, *supra* note 23.

27. U.S. GENERAL SERVS. ADMIN., *supra* note 8.

28. *See generally* United States v. Shavrnock, 49 M.J. 334 (1998) (holding that non-punitive regulations or rules may establish standards for which an accused may be prosecuted for dereliction); *see also* U.S. DEP'T OF ARMY, PAM 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHMARK para. 3-16-4 (15 Sept. 2002) [hereinafter BENCHMARK].

29. PURCHASE CARD CONCEPT OF OPERATIONS, *supra* note 7, at 21. Before seeking items from commercial vendors, cardholders must review mandatory supply sources such as National Industries for the Blind (NIB). *Id.*

30. DAU Training Site, *supra* note 23.

Among transactions that require pre-purchase approval from an official other than the cardholder are the following: (1) printing or reproduction services other than DAPS;³¹ (2) hazardous materials; (3) advertising; (4) items purchased with representational funds; (5) items for personal convenience (including appliances and clothing); (6) food and bottled water; (7) professionally printed business cards; and (8) trophies, plaques and mementos³². The procurement rules governing such transactions are complex, and the purchases often require legal opinions from judge advocates.

2. Unauthorized Purchases

The Army's GPC Standard Operating Procedure (SOP) identifies the most common types of purchases or transactions that are strictly prohibited.³³ Among the overarching categories of prohibited transactions are the following: (1) cash advances and wire transfers; (2) vehicle lease agreements; (3) motor vehicle repair; (4) long-term lease of land or buildings; (5) gasoline and other fuel purchases; (6) purchases of major telecommunication systems; (7) construction services over \$2000; (8) securities purchases of any kind; (9) transactions with political organizations; (10) payment of court costs, fines, bail or bond; (11) gambling; (12) transactions with dating and escort services; (13) tax payments; and (14) payment of alimony or child support judgments.³⁴

In addition to the restrictions on certain types of transactions, regulations prohibit GPC purchases from certain classes of merchants, whose businesses are identified by a government coding system. Among the prohibited merchant categories are: jewelry stores; antique dealerships; pawn shops; wire transfer and money order dealers; gambling establishments; financial institutions; dating and escort services; courts; and political organizations.³⁵

Finally, GPC fiscal controls include individual and monthly purchase limits. The basic rule is that all purchases are subject to the availability of funds and in no circumstances should a cardholder make purchases that are not funded or authorized.³⁶ An unauthorized or unfunded purchase may violate the Anti-Deficiency Act and could result in adverse administrative or disciplinary action.³⁷ Even when funds are available, however, two significant restrictions remain—those against split purchases and split requirements. Cardholders may not split the purchase of items exceeding the micro-purchase limit of \$2,500 by making two or more purchases that fall under the purchase limit.³⁸ A classic example of a split purchase is a computer CPU purchase of \$1,800, and a separate purchase of its \$900 monitor, made separately to circumvent the micro-purchase limit.

Splitting requirements is use of the purchase card to avoid formal contracting procedures mandated by the nature of the purchase(s). Cardholders, for example, cannot split the requirements of a large contract, such as a need for an office computer network worth \$150,000 dollars, into multiple purchases with the GPC.³⁹

3. The GPC Dispute Process

Like other credit cards, the GPC may be lost, stolen, or the subject of billing errors. Cardholders may be victims of identity theft, or have their card numbers compromised. A GPC billing dispute process is available to address such problems whenever they occur. If a cardholder finds transactions for which she is not responsible on the statement of account, she should submit a dispute form to the card-issuing bank within sixty days of the statement.⁴⁰ Failure to submit the dispute form and the accompanying affidavit could result in liability to the government.⁴¹ The dispute process becomes relevant in disci-

31. FAR, *supra* note 6, at 8.802.

32. Memorandum, Office of the Assistant Secretary of the Army Acquisition, Logistics and Technology, to See Distribution, subject: Army Standing Operating Procedure for the Government Purchase Card Program (1 July 2002); *see generally* CONTRACT & FISCAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, 52D GRADUATE COURSE FISCAL LAW DESKBOOK ch. 2, para. VII.A-D, at 19-24 (Spring 2004) [hereinafter FISCAL LAW DESKBOOK]. The general prohibition on food purchases with appropriated funds is subject to limited exceptions. A unit may purchase bottled water if an outside water-testing agency issues a written report stating the available drinking water is non-potable. *See id.*

33. ARMY SOP, *supra* note 10, at 19-20.

34. *Id.*

35. *Id.*

36. PURCHASE CARD CONCEPT OF OPERATIONS, *supra* note 7, at 21.

37. 31 U.S.C. § 1341 (2000). The Antideficiency Act's enforcement provision states, in pertinent part, "[a]n officer or employee of the United States Government . . . knowingly violating section[s] 1341(a) or 1342 of this title shall be fined not more than \$5,000, imprisoned for not more than 2 years, or both." *Id.* § 1350.

38. U.S. DEP'T OF DEFENSE, REG. 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION vol. 5, para. 0210 (July 2000) [hereinafter DFMR].

39. FAR, *supra* note 6, at 13.202(a).

40. DAU Training Website, *supra* note 23.

plinary actions when cardholders accused of misconduct deny making the purchase(s) giving rise to the charges against them. A cardholder's assertion that she never made certain purchases invariably raises the question of whether she disputed them when they arrived on the account statement. Whether the cardholder followed through with the dispute process could also have implications for offenses such as dereliction of duty.

If a cardholder reports his card stolen, the bank closes the account and issues a new card. While reporting the card stolen invalidates all further purchases, it does not relieve the government of its responsibility for any transactions made by the cardholder before reporting it stolen.⁴² Cardholders who report their cards stolen may also be required to sign an affidavit confirming their report.⁴³

Perhaps most significant is what the agency cannot dispute. If the cardholder makes a transaction within the single purchase limit, and not from a vendor with a blocked merchant category code, the issuing bank that paid the charges has fulfilled its contractual obligation and the government is bound to reimburse it. Thus, even when a purchase is frivolous, the government must usually pay the charges. This contractual obligation makes the government the victim, rather than the merchant or the bank, in most GPC misconduct cases, and is an important aspect of criminal prosecution and civil recovery. If a transaction is unauthorized, the agency should return the merchandise, or should seek reimbursement from the cardholder, the AO (if applicable), or both.⁴⁴

D. The GPC Purchase Process

To understand misconduct involving the GPC, one must first understand the fiscal implications inherent in each stage of the purchase process. Unlike the Government Travel Card, which

provides the cardholder a line of credit, the GPC expends government funds for required goods and services. Only when there is misconduct must, a cardholder or AO reimburse the government.⁴⁵

Purchases with the GPC are funded through advance reservation of funds, in the form of either bulk commitments or bulk obligations.⁴⁶ In other words, a resource manager (or equivalent person) sets individual and office purchase limits for the organization and reserves (commits) a certain amount of funds in advance of purchases.⁴⁷ Thus, certifying officials do not individually approve (certify) the expenditure of funds in advance of each purchase. The following is a summary of a purchase card transaction. First, after identifying a need and selecting a vendor or contractor, the cardholder presents the GPC as the means of payment; second, the vendor or contractor provides the goods or services on the credit of the United States. The government's obligation to pay the invoice is, however, revocable; i.e., the obligation is subject to revocation if the purchase exceeds authorized limits or is with a prohibited vendor.⁴⁸ Third, the AO certifies the purchase as an authorized expenditure and forwards it to the disbursing office; and fourth, the disbursing office pays the debt. Understanding the fiscal process is crucial to a successful prosecution or defense, as both the offense and the victim may vary depending on what the cardholder purchases and whether the government pays the charges.

IV. Characterizing Misconduct

Following earlier reports from government investigations which failed to find systemic problems in the GPC program,⁴⁹ investigations by the U.S. General Accounting Office (GAO) found numerous abuses, ranging from mere negligence to outright fraud.⁵⁰ The GAO reported that misconduct involving the GPC had been carried out through every means from splitting

41. *Id.*

42. *Id.*

43. *Id.*

44. PURCHASE CARD CONCEPT OF OPERATIONS, *supra* note 7, at 30.

45. *Id.*

46. *See id.* at D, pp. 61-68; U.S. DEP'T OF DEFENSE POLICIES FOR ADVANCE RESERVATION OF FUNDS, ACCOUNT TREATMENT AND BILLING STATEMENT PROCESSING FOR MICRO-PURCHASE TRANSACTIONS USING THE GOVERNMENT PURCHASE CARD (Mar. 22, 2002).

47. PURCHASE CARD CONCEPT OF OPERATIONS, *supra* note 7, at D, pp. 61-68.

48. *Id.* at 14.

49. *See* Memorandum, Assistant Secretary of Army for Acquisition Logistics and Technology, to Inspector General, Dep't of Defense Director, Defense Finance and Accounting Service Director, Defense Manpower Data Center, subject: Operation Mongoose Fraud Detection Program (5 Oct. 2001) (on file with author). In June 1994, the Under Secretary of Defense (Comptroller) joined with the Defense Finance and Accounting Service, and the Defense Manpower Data Center to create a fraud detection and control program dubbed "Operation Mongoose." *See id.*

50. *See generally* U.S. DEP'T OF DEFENSE, INSPECTOR GEN. AUDIT REP. D-2002-075, *Controls Over the DOD Purchase Card Program* (Mar. 29, 2002), available at https://www.us.army.mil/portal/portal_home.jhtml (discussing among other reports, GAO REP. 02-32, GAO REP. 02-506T).

purchases, to altering purchase receipts and records, to conspiracies between cardholders and AOs (or others).⁵¹ For example, a 2001 GAO audit of the purchase card program of two U.S. Navy units revealed the following: forty-six of sixty-five major items such as laptop computers purchased with the GPC never appeared on property books at the inspected units; cardholders repeatedly used the GPC to buy personal items from jewelry to pizza; and screening of potential cardholders was so lax that any employee with supervisory approval was able to obtain a card.⁵² A second review of the units, conducted one year later, revealed many of the same weaknesses.⁵³

The reports of program weaknesses and cardholder misconduct prompted the DOD to initiate further studies to identify the basis for the problems in the GPC program. In March 2002, the Under Secretary of Defense (Comptroller) established a task force to investigate the DOD's charge card programs, find their weaknesses, and recommend ways to strengthen the programs; it was given sixty days to return its findings. The task force's final report, released in June 2002, identified the following weaknesses in the program: excessive numbers of cardholders in the program; inadequate training; too many cardholders within the AOs' span of control; and inadequate component regulations.⁵⁴

The Department of the Army's SOP, released on 31 July 2002, cited many of the same weaknesses uncovered by the DOD Charge Card Task Force. The weaknesses manifested themselves in numerous forms of misconduct including: split purchases; unauthorized purchases; payment for items not received; cardholders returning items to merchants for store credit vouchers rather than having credit issued to the card; certifying invoices without proper review; excessive purchases with one vendor; lack of accountability for nonexpendable or sensitive items; cardholders or billing officials allowing persons other than the named cardholder to use the card; and purchase approvals by persons other than the authorized AO.⁵⁵

Although the DOD and the GAO publications often use terms like abuse and fraud interchangeably, distinctive categories that mirror the disciplinary responses are a beneficial tool for the legal practitioner. Although the categories are not mutually exclusive and contain some artificial distinctions, they aid commanders in determining the most appropriate administra-

tive or disciplinary responses by placing misconduct on a continuum. For the purposes of this article, improper conduct involving the GPC card is divided into three non-exclusive categories: misuse; abuse; and complex fraud.

A. Misuse

Misuse is the failure to use the GPC properly, but not for personal gain. Misuse includes misconduct from simple negligence, such as unknowingly buying unauthorized items, to knowingly making unauthorized purchases, all ostensibly to benefit the service. Misuse also includes purchases of authorized items at excessive costs, such as personnel buying expensive Bose clock radios for office use when less expensive brands are readily available.⁵⁶

In our introductory example, SGT Andrews' conduct—purchasing items without obtaining the required special authorization—constituted misuse. His purchases, while in violation of fiscal rules, were not for personal gain.

B. Abuse

Abuse is use of the purchase card, or disposition of property purchased with the card that falls short of complex fraud but it is conducted for personal gain. Abuse encompasses making unauthorized cash advances, purchasing items solely for personal purposes, and selling or pawning items purchased with the GPC. Although fraud is inherent in the recordation process whenever the cardholder certifies that improper purchases are for governmental purposes, the fraud is not complex—proper review by the AO would detect it. Likewise, a properly implemented property accountability system would detect items purchased, but not recorded in the unit property book.

In contrast to SGT Andrews, who acted on behalf of the unit, SPC Benton used her GPC for her own benefit. Her sale of office equipment (the laptop and PDA) and purchase of purely personal items (clothing and jewelry), illustrate two types of cardholder abuse—wrongful disposition of military property and unauthorized purchases—both facilitated by a lack of accountability on the part of program officials.

51. *Id.*

52. See GAO REP. 02-32, *Purchase Cards: Control Weaknesses Leave Two Navy Units Vulnerable to Fraud and Abuse* 2-3 (Nov. 2001), available at <http://www.gao.gov/new.items/d0232t.pdf>.

53. See generally GAO REP. 02-506T, *Purchase Cards: Continued Control Weaknesses Leave Two Navy Units Vulnerable to Fraud and Abuse* (Mar. 2002), available at <http://www.gao.gov/new.items/d02506t.pdf>.

54. DOD CHARGE CARD TASK FORCE FINAL REPORT 2-6, 27 June 2002, available at http://www.fmo.navy.mil/doc/purchase_card/DOD_Charge-Card_Task_Force_Final.report_06_27_02.pdf.

55. ARMY SOP, *supra* note 10, at 9-10.

56. GAO-04-156, *supra* note 2, at 7.

C. Complex Fraud

Complex fraud is misconduct motivated by personal gain, but carried out through acts of deception designed to defeat accountability controls. Complex fraud includes acts such as altering purchase records or signing receipts for nonexistent purchases. Also included in complex fraud are kickbacks from the vendor to the cardholder (including conflicts of interest), and any schemes involving both the cardholder and the AO.

Of the three cardholders from our initial example, SFC Calhoun's conduct is most egregious and is a case of complex fraud. SFC Calhoun's misconduct, like that of SPC Benton, included fraud, but extended far beyond representing improper purchases as legitimate. His scheme not only involved conflicts of interests, but also included a series of false statements designed to steal thousands in government funds. Sergeant First Class Calhoun's complex enterprise defeated the approval process and audit system, and violated several federal laws. His fraudulent purchase scheme was similar to that in *United States v. Brown*,⁵⁷ in which the defendant, a retired Army warrant officer and owner of a military surplus store in Fayetteville, North Carolina, formed a cabal with Soldiers stationed at nearby Fort Bragg. Brown created phony invoices and charged the government for purchases that were never made, and in return, gave cash kickbacks to the Soldiers who had allowed him to use their GPCs. Brown was convicted of larceny of government funds, conspiracy to commit larceny, false statements, and wire fraud.⁵⁸

*United States v. Durant*⁵⁹ was a case involving collusion between the cardholder and the AO. Durant, an Army sergeant, was approached by his AO and supervisor, Staff Sergeant (SSG) Cochrane, who devised a scheme whereby Durant would make unauthorized purchases of personal items for both men with his IMPAC purchase card. Staff Sergeant Cochrane would then approve the purchases and authorize payment with government funds. Over the next two years, Durant made over ninety unauthorized purchases totaling more than \$30,000 for himself, SSG Cochrane, and others. Durant progressively increased the amounts of purchases that he illegally made with his purchase card, knowing that SSG Cochrane would approve the purchases and cover for him. Both men were eventually prosecuted, with Durant pleading guilty to two specifications of

larceny, while Cochrane pleaded guilty to conspiracy and eight specifications of larceny.⁶⁰

V. Prosecuting Government Purchase Card Misconduct

The government has a variety of potential responses to misconduct involving the GPC. In its December 2003 report to Congress, however, the GAO reported that the military had not taken strong disciplinary action against cardholders who misused the GPC, largely because many purchases, though ill-advised, did not "directly violate existing service policies."⁶¹ The GAO reported that the services punished the most egregious complex fraud schemes with courts-martial (and removal for civilian employees), but often took little or no disciplinary action in response to misuse or abuse.⁶² While selecting the most appropriate response is the commander's prerogative, they will need the counsel of judge advocates, who must advise them of the gravamen of the offense(s) and provide the cost-benefit analysis of administrative versus punitive action.

Citing our earlier examples, SGT Andrews' well-intended but ill-conceived purchases might likely result in counseling or retraining, reprimand, reimbursement, or some combination of these measures. In contrast, one would expect a more severe command response to SPC Benton, who specifically intended to steal military property and wrongfully committed government funds to make her personal purchases. The government might opt for nonjudicial punishment or adverse administrative actions, along with reimbursement, but court-martial charges are also a possibility. Sergeant First Class Calhoun's conduct, however, would almost certainly warrant court-martial charges.

In courts-martial, misconduct involving the GPC poses complex legal issues in both guilty pleas and contested cases. Is merchandise purchased with the GPC government property even if the government never requested it, authorized it, or possessed it? What about the proceeds of items bought with the card but then sold? What charge(s) apply if the cardholder makes an improper purchase, but the AO refuses to certify it, and the funds are never disbursed? To prosecute successfully, the trial counsel must understand the major theories of criminal liability in several factual permutations and must conduct a careful, fact-intensive analysis. Likewise, the defense counsel

57. *United States v. Brown*, No. 98-4592, 1999 U.S. App. LEXIS 11333 (4th Cir. June 3, 1999).

58. *Id.* The U.S. Attorney's Office and the defense disagreed over the amount of the government's loss, the defense arguing for the presentence investigation figure of over \$85,000, but the government estimating it at over \$200,000. Brown stated he had made only thirteen fraudulent transactions while the government alleged hundreds. *Id.*

59. *United States v. Durant*, 55 M.J. 258 (2001).

60. *Id.* The only issue on appeal was the sentence disparity between SGT Durant, and his co-actor, SSG Cochran. The court offered no explanation for the disparity, other than noting that SGT Durant and SSG Cochrane were referred to trial by different convening authorities and tried at different locations. *Id.*

61. GAO-04-156, *supra* note 2, at executive summary.

62. *Id.* at 13-15.

must also master the theories of criminal liability to properly defend their clients.

A. General Principles of Prosecution under the UCMJ

Although the UCMJ does not specifically address GPC misconduct, the broad provisions of Article 121, UCMJ, proscribes various forms of theft, including obtaining property by false pretenses and embezzlement.⁶³ Choosing the most appropriate charge, however, is a tactical decision, often dictated by intricate factual nuances. For example, while the GPC is a means of paying authorized contracts, it has also been used to secure unauthorized services, such as personal automobile rentals.⁶⁴ While such purchases are impermissible, only monies⁶⁵ and tangible items may be the subject of an Article 121 offense.⁶⁶ Theft of services does not violate Article 121, but rather Article 134.⁶⁷

Like the substantive offense itself, in GPC cases, the victim may vary. While the comments in Article 121 state that obtaining property through wrongful use of credit cards “usually [constitutes] a larceny of those goods from the merchant offering them,”⁶⁸ the fiscal rules of GPC transactions may result in a different victim. Depending on the circumstances, improper GPC use may constitute theft of government funds, theft of merchant’s property, or theft of government property under Article 108, UCMJ.⁶⁹ When the cardholder obtains services, but the government does not pay the charges, a prosecution under Article 134 may result. To successfully try their cases, counsel must navigate the intricacies of proof by matching the cardholder’s actions with the fiscal constraints inherent in purchase card transactions.

*United States v Russell*⁷⁰ is, perhaps, the seminal case on GPC misconduct, addressing the nature of property purchased with the card. In *Russell*, the appellant, an airman basic, pleaded guilty to dereliction of duty, false official statement, wrongful disposition of military property and eight specifications of larceny of military property for his abuse of the GPC. Russell, a GPC holder, used his GPC to buy numerous household items that the Air Force never requested. The court remarked, “Some of the items he would take to his workplace; others he would take directly from the civilian source to his quarters, never intending them to be turned over to the Government.”⁷¹ The Court of Appeals for the Armed Forces (CAAF) addressed one issue on appeal: the sufficiency of Russell’s guilty pleas to the wrongful disposition of military property and larceny of military property when the government never requested, authorized, used, or possessed any of the items that Russell bought with his GPC.⁷²

The court, citing the military purpose of the items (which could have been used in the Air Force’s refrigerator systems), and Russell’s admissions during the providence inquiry, concluded that the property in question was military property, even though the government never ordered or possessed it.⁷³ While the court settled the question by determining the property’s potential use, it fell short of a definitive ruling on the applicable charges when property had no military use. Moreover, the *Russell* court left undecided issues such as when theft of merchant property or theft of military funds is the more applicable charge. Instead, the courts’ analysis on these issues spans twenty years, from *United States v. Christy*,⁷⁴ a case before the Navy-Marine Court of Criminal Appeals (NMCCA), to *United States v. Albright*,⁷⁵ the Army Court of Criminal Appeals (ACCA).

63. See UCMJ art. 121 (2002). “Not unlike the law of many state jurisdictions, Article 121, UCMJ, 10 U.S.C. § 921, proscribes larceny in its various forms, incorporating false pretense and embezzlement. The UCMJ eliminates their technical distinctions and provides for a simplified pleading form to cover the different theories of theft.” *United States v. Christy*, 18 M.J. 688 (N.M.C.M.R. 1984); see also *Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm.*, 81st Cong., 1st Sess. 815, 1232 (1949).

64. *United States v. Green*, 44 M.J. 631 (C.G. Ct. Crim. App. 1996).

65. “In sum, the ambit of Article 121 is limited to ‘money, personal property, or articles of value of any kind.’” *United States v. Antonelli*, 35 M.J. 122, 126 (C.M.A. 1992). Public funds are the revenue or money of a governmental body or securities of the national government or a state government. BLACK’S LAW DICTIONARY 682 (7th ed. 1999). To the extent that such revenue, money, or securities are tangible “articles of value,” the theft of public funds may constitute larceny. See UCMJ art. 121.

66. See *United States v. Albright*, 58 M.J. 570, 572 (2003) (quoting *United States v. Mervine*, 26 M.J. 482, 483 (C.M.A. 1988)). But see *United States v. Sanchez*, 54 M.J. 874, 878 (Army Ct. Crim. App. 2001) (processing fees charged by banks in connection with ATM fraud was not proper subject of larceny under Article 121).

67. See UCMJ art. 134; see also MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 78 (2002) [hereinafter MCM].

68. *Id.* pt. IV, ¶ 46(c)(1)(h)(vi).

69. See UCMJ art. 108.

70. *United States v. Russell*, 50 M.J. 99 (1999).

71. *Id.* at 100.

72. *Id.*

73. *Id.*

In *United States v. Christy*, the NMCCA conducted a comprehensive analysis of Article 121, *vis-a-vis* GPC misconduct. In *Christy*, the accused improperly used his government credit card for his personal benefit and obtained gasoline from a number of gas stations. The court ruled that Christy, who made the purchases under false pretenses, induced the service stations to part with their property for an unauthorized commitment, a transaction they would not have entered into absent the cardholder's deception. Thus, larceny of the merchants' gasoline occurred immediately, even though the government later paid the bill. The court further found that by obligating the government, Christy created a possessory interest in the gasoline for the United States that was superior to his own.⁷⁶ The court's analysis was as follows:

When the appellant [Christy] consumed the gasoline for his personal benefit, larceny of the purchased gasoline was complete. In these circumstances, it matters little whether the appellant's conduct is viewed as a wrongful taking or embezzlement; it is larceny. Appellant's stated intention to pay to the Government the cash equivalent of the gasoline did not reduce the offense from larceny to wrongful appropriation.⁷⁷

The *Christy* court's basic analysis is sound. One does not nullify one's theft of an item belonging to the government, a computer, for example, by later offering to repay the item's value.⁷⁸ Cash, however, is fungible, and the UCMJ recognizes a defense to larceny when the accused takes money, but intends to return an equivalent amount.⁷⁹ Moreover, reimbursement (at least of the bank) is an inherent aspect of credit card transactions, ostensibly making claims of intended reimbursement more viable. Although it did not explicitly state its rationale, the *Christy* court likely rejected wrongful appropriation as a viable theory of criminal liability because reimbursement is not

an ordinary feature of purchase card transactions. In larceny cases in which the accused seeks a safe haven in the lesser-included offense of wrongful appropriation, government counsel should rebut the assertion by pointing out that reimbursement by cardholders is a government-initiated process, conducted in response to misconduct, not at the cardholder's whim. The absence of a regular reimbursement process may be used as circumstantial evidence of the cardholder's intent when making the transaction.

Although *Christy* is twenty-years old as of this writing, the court's detailed analysis is still relevant; the ACCA cited it as recently as 2003.⁸⁰ Portions of the *Christy* court's analysis—supporting larceny from the merchant service stations—do not survive the fiscal law considerations inherent in the current GPC purchase process. Citing the accused's false representations to the merchants, *Christy* posited that had the service station operators known the purchases were unauthorized, they would not have transferred the gasoline. The court thus concluded that upon purchase, the accused stole the merchants' gasoline; it was inconsequential that they did not suffer actual pecuniary loss.⁸¹ The court, therefore, presumed that the government would not pay for unauthorized commitments, an analysis inapplicable to today's GPC purchase process. The government's contractual obligation to remunerate the bank, even for unauthorized GPC transactions, means the merchant is almost always paid (barring one of the earlier mentioned prohibitions). Thus, in most GPC cases, unless the cardholder cancels the transactions, theft of a merchant's property is usually eliminated as a viable theory of criminal liability. To apply the correct analysis and find the proper charge(s), counsel must ascertain whether the purchase was for a documented government need, and must carefully track both the purchase and the property, often in several possible permutations.

74. *United States v. Christy*, 18 M.J. 688 (N.M.C.M.R. 1984).

75. *United States v. Albright*, 58 M.J. 570 (2003).

76. *Christy*, 18 M.J. at 690; *see also* *United States v. Jett*, 14 M.J. 941 (A.C.M.R. 1982); *United States v. Leslie*, 13 M.J. 170 (C.M.A. 1982); *United States v. Ragins*, 11 M.J. 42, 47 (C.M.A. 1981).

77. *Christy*, 18 M.J. at 690.

78. MCM, *supra* note 67, pt. IV, ¶ 46c(1)(f)(iii)(B).

79. *Id.*

80. *Albright*, 58 M.J. at 572-73.

81. *Christy*, 18 M.J. at 690; *see also* *United States v. Rubenstein*, 22 C.M.R. 313 (C.M.A. 1957); *United States v. Turiano*, 13 C.M.R. 753 (A.F.B.R. 1953).

B. Prosecution under Various Provisions of the UCMJ

1. *Larceny in Several Factual Permutations*

a. *Cardholder Keeps Goods; Government Makes Payment*

In *Russell*, the CAAF established that items purchased with the GPC are military property, even if they were never approved for purchase and never in the government's possession.⁸² Thus, it would appear that theft of military property is the appropriate charge whenever the cardholder purchases items with the GPC, the government pays for the items, and the cardholder then keeps them. It is noteworthy, however, that *Russell* was a guilty plea in which the accused conceded that the items he purchased became military property. Questions over ownership persisted nevertheless, with some of the appellate judges determining the items were military property using evidence other than Russell's admissions.⁸³ Indeed, the *MCM* and the *Military Judge's Benchbook (Benchbook)* appear at odds when defining military property. The *MCM* defines military property as: "[A]ll property, real or personal, owned, held, or used by one of the Armed Forces of the United States."⁸⁴ The definition of military property found in the *Benchbook*, however, is even more restrictive, requiring that the property have, "either a uniquely military nature or [be] used by an armed force in furtherance of its mission."⁸⁵ As has been demonstrated, GPC misconduct may involve property with no legitimate military purpose.

Thus, charges of theft or wrongful appropriation of military property are appropriate whenever the cardholder keeps goods purchased with the GPC. The government, however, may also charge theft of public funds. How to charge depends upon a subtle but important distinction. Theft of military funds implies wrongfulness in the purchase itself, which is not necessarily the case when the cardholder buys items to fulfill a documented government need. Thus, the government is better served by charging theft of military funds only when the items purchased (jewelry, for example) are for purely personal use. Prosecutors should charge theft of military property when the property was intended to fulfill governmental needs, but was not surrendered to the unit.

From our initial examples, SPC Benton should be charged with wrongful disposition of military property (assuming the purchases were to fulfill legitimate needs) for pawning the laptop computer and PDA. Her purchases of clothing and jewelry, however, are better charged under a separate specification as theft of government funds.

Prosecutors alleging larceny must remember their responsibility of proving payment actually occurred. Likewise, defense counsel must remember that theft of government funds does not take place until the payment occurs—purchase receipts alone are insufficient proof that the funds were actually disbursed.⁸⁶ Although a subsequent government payment does not negate the wrongfulness of the original transaction,⁸⁷ for obvious reasons, a prosecutor would be well advised not to charge theft of the vendor's goods or services when the merchant has been paid.

Questions concerning property ownership invariably arise at trial, and counsel must prepare for them. For example, in a guilty plea case involving theft, wrongful appropriation, or wrongful disposition of military property, trial counsel must ensure that the accused admits that the item(s) in question are, in fact, military property because public funds covered the purchase(s). In a providence inquiry, both trial and defense counsel should expect a question from the military judge along the lines of, "Whose property did you think it was?" In response, the accused must articulate why he or she believes that the property is, in fact, military property. Simply agreeing to legal definitions is not sufficient to ensure a provident plea.⁸⁸ Thus, a response of, "Although I was purchasing the item for my personal benefit, I knew it rightfully belonged to the government because the government was going to pay for it," would likely survive the providence inquiry, while a response of, "I thought the property was mine," might well result in a broken pretrial agreement or an appellate issue.

b. *Cardholder Keeps Goods; Payment Not Made*

In contrast to theft of government funds, theft of military property does not require actual payment; payment need only be pending. In an improper GPC transaction in which the government has not paid the charges, whether disbursement *was to occur* determines whether the government or the merchant is

82. *United States v. Russell*, 50 M.J. 99 (1999).

83. *Id.* at 101.

84. *See MCM*, *supra* note 67, pt. IV, ¶ 32(c)(1).

85. *See BENCHBOOK*, *supra* note 28, para. 3-46-1.

86. *See United States v. Franchino*, 48 M.J. 875 (C.G. Ct. Crim. App. 1998).

87. *United States v. Albright*, 58 M.J. 570, 573 (2003).

88. *Russell*, 50 M.J. at 99 (quoting *United States v. Outhier*, 45 M.J. 326 (1996)).

the victim. When the agency is obligated to pay, but simply has yet to do so, the government, by virtue of its obligation, obtains a right of possession superior to that of the cardholder.⁸⁹ The cardholder who wrongfully takes such merchandise may thus be convicted of theft of military property.

When no payment is pending, a different analysis applies. When the cardholder receives the goods or services, but the funds are *never* disbursed due to discovery and subsequent disapproval of the merchant's category, the government incurs no obligation and the merchant is the victim. An example of such a situation is when the cardholder uses the GPC to purchase Internet-based entertainment services. If the AO spots the unauthorized transaction, disallows it, and the disbursing officer subsequently refuses payment, the merchant is the victim, and if the cardholder is charged, it should be under Article 134, UCMJ, for theft of services.⁹⁰

c. Cardholder Sells Goods; Government Makes Payment

A cardholder who disposes of property purchased with the GPC violates Article 108, UCMJ, just like any other offender who disposes of military property.⁹¹ Proper purchase recordation and efficient property accountability procedures are essential to substantiating such allegations. One who keeps profits associated with a sale or wrongful disposition is guilty of wrongfully withholding government funds.⁹²

d. Cardholder Sells Goods; Payment Not Made

When payment has not occurred (but is pending), and the cardholder purchases merchandise with the GPC, sells it, and pockets the proceeds, the offense is neither *theft* of government funds, nor wrongfully *obtaining* government funds, but rather

wrongfully *withholding* government funds.⁹³ Such was the case in *United States v Albright*, when the accused, an Army supply specialist, purchased numerous items with the GPC, including five laptop computers and seven pagers, most of which she then sold. Although the trial judge accepted Albright's plea to wrongfully obtaining public funds in violation of Article 121, UCMJ, there was no evidence that any government funds were actually disbursed.⁹⁴ Relying on the *Christy* court's analysis, the ACCA stated that Albright might have been convicted of theft of government funds had the monies actually been disbursed, but without such proof, such a charge was inapplicable.⁹⁵ Albright's guilty pleas to larceny of public funds, which the government charged as a wrongful "taking" of government funds, were, therefore, inaccurate. Instead, the court reasoned, Albright wrongfully withheld military property by keeping her purchases, in which the government held a superior possessory interest. She converted the government's property into cash by selling the merchandise, and should have surrendered the proceeds to the government.⁹⁶ By keeping the money, Albright wrongfully *withheld*, rather than *obtained* government funds.⁹⁷ Despite the variance, the court upheld Albright's plea, but chastised both the trial counsel and the trial judge for failing to grasp the proper theory of liability.⁹⁸

2. Dereliction of Duty

Prosecution for dereliction of duty requires proof that the accused knew or should have known of his duty and that his actions inconsistent with the duty were either willful, the result of neglect, or the product of culpable inefficiency.⁹⁹ Regulations establishing the duty need not be punitive.¹⁰⁰ Dereliction, therefore, may be either *failure to act* in accordance with established procedures, such as failure to maintain a proper purchase log, or *affirmative acts* of misconduct, such as circumventing the guidelines by making split purchases. In either case, the model specification is sufficient, but when the government

89. *United States v Christy*, 18 M.J. 688, 690 (1984).

90. UCMJ art. 134 (2002).

91. *Id.* art. 108.

92. *Albright*, 58 M.J. at 573.

93. *Id.*

94. UCMJ art. 121.

95. *Albright*, 58 M.J. at 573.

96. *Id.*

97. *Id.*

98. *Id.* at n.3.

99. MCM, *supra* note 67, pt. IV, ¶ 16c(3).

100. See *United States v. Shavrnock*, 49 M.J. 334 (1998); *supra* note 28 and accompanying text.

alleges affirmative acts of dereliction, the drafter should, for clarity, follow the standard language in the model specification with the details of the accused's conduct.

At trial, proof of training and guidance given to the cardholder or the AO is critical. Standardized, mandatory training provides the prosecution a starting point, but the prosecutor must produce copies of the accused's training certificates. Government counsel should also obtain any local training records, and should use training materials (including printouts of training slides or other training materials) at trial. Likewise, defense counsel should watch for incomplete training records at any level.

3. *Conduct Unbecoming*

While officer misconduct involving the GPC may be prosecuted under Article 133, UCMJ,¹⁰¹ an impermissible multiplication of charges could become an issue. The accused in *United States v. Palagar*,¹⁰² an Army Chief warrant officer and battalion maintenance officer, was charged with conduct unbecoming an officer for making false charges, and larceny for essentially the same acts—obtaining funds by making false charges against the GPC. The military judge denied a defense motion to dismiss the larceny and obstructing justice charges as multiplicitious with the charge of conduct unbecoming an officer. Before the military judge announced the sentence, however, he informed the parties that he considered, “The clear overlap and relation between the misconduct which [made] up the subject matter of all of the offenses as a matter of extenuation.”¹⁰³ The CAAF ruled, however, that where the accused's unauthorized purchases comprised the factual basis for both larceny and conduct unbecoming an officer, the charges were multiplicitious.¹⁰⁴ Prosecutors should, therefore, be judicious in charging under Article 133, UCMJ,¹⁰⁵ using it to prosecute collateral misconduct surrounding the purchases, such as the use of government computers to carry out credit card scams.

4. *False Statements*

False statements are inherent in improper GPC purchases, as the cardholder and AO must ultimately certify every purchase

as fulfilling governmental needs. A cardholder or AO who knowingly signs a bogus certification, presents fictitious or altered receipts, or makes a false official representation may be subject to court-martial charges. Once again, *Palagar*,¹⁰⁶ provides guidance. Palagar used his government-issued IMPAC card to make \$2,242 worth of unauthorized purchases for his personal use. He signed and submitted a false “Statement of Account” to his IMPAC AO, which he supported with phony receipts that he created on a computer. The phony receipts purported to document purchases that Palagar never made. Palagar also altered some receipts by writing over the unauthorized items or by folding and photocopying the receipts to conceal his purchases of unauthorized items, and he submitted the altered receipts to an officer appointed to investigate his suspected misuse of the IMPAC card. He was subsequently convicted of submitting a false official record and of obstructing justice (by submitting an altered receipt to an investigating officer). The *Palagar* case illustrates the need for supervisory officials to reconcile cardholder statements against their own separate account statements, preferably in an unalterable, read-only computerized format received directly from the bank.

5. *Conflict of Interests*

Portions of the Joint Ethics Regulation (JER) are punitive and may be charged under Article 92, UCMJ, Violation of a Lawful General Regulation.¹⁰⁷ The punitive provisions apply to enlisted personnel as well as officers, as the accused found in *United States v. Hawkins*.¹⁰⁸ Hawkins, an Air Force master sergeant and IMPAC cardholder, was the superintendent of a post gym at an overseas airbase. He was convicted of, among other offenses, violating the JER, for conflicts of interest in awarding base contracts. Hawkins stipulated that sometime during August 1995, his wife and brother-in-law decided to create a corporation in the United Kingdom called Eagle Alarm and Electronics Limited (Eagle). Hawkins admitted that his wife had a direct financial interest in Eagle (she was the secretary of the company), and further admitted that she spent the Hawkins' money to set up the business. It was he, however, who filled out the documentation that enabled Eagle to become an incorporated company in the United Kingdom.¹⁰⁹

While Hawkins was superintendent of the post gym, the Air

101. UCMJ art. 133 (2002); see *supra* note 28.

102. *United States v. Palagar*, 56 M.J. 294 (2002).

103. *Id.* at 297.

104. *Id.*

105. UCMJ art. 133.

106. *Palagar*, 56 M.J. at 294.

107. See generally U.S. DEP'T OF DEFENSE, DIR. 5500.7-R, THE JOINT ETHICS REGULATION [hereinafter JER] (1993); see UCMJ art. 92.

108. *United States v. Hawkins*, No. 33087, 2000 CCA LEXIS 266 (A.F. Ct. Crim. App. Nov. 6, 2000) (unpublished).

Force identified a need for an improved security system for the facility. During 1995 and 1996, Hawkins manipulated the bid system to send contracts to Eagle. He also stipulated that on three occasions, he used his IMPAC card to make purchases directly from Eagle in his official capacity, either as the superintendent of the gym or as the noncommissioned-officer-in-charge of billeting. After two of these purchases, Hawkins or his wife withdrew cash from an Eagle bank account and deposited it into their personal bank account. Hawkins stipulated that his certification (i.e., that his purchases from Eagle were made in good faith) was false. Hawkins' conduct was eventually uncovered and he was charged under Article 92, UCMJ, for violating two provisions of the JER.¹¹⁰

Though the facts were overwhelming and led to a guilty plea, Hawkins challenged his conviction on appeal, claiming that his pleas to Article 92 were improvident because the ethical rules did not apply to noncommissioned officers and because he never indicated to the military judge that his spouse was a compensated employee or had a financial interest in Eagle. The court found all of Hawkins' arguments unpersuasive and affirmed both the findings and the sentence.¹¹¹

C. Fact-Based Defenses and Government Responses

Despite the potential complexity of GPC prosecutions, defenses may be relatively simple. Cardholders accused of misconduct involving the GPC may claim one of eight, non-mutually exclusive defenses: (1) they did not make the transaction(s); (2) their purchase(s) were within program guidelines and therefore permissible; (3) they were unaware of program rules; (4) they mistakenly used the wrong credit card; (5) their purchases, although proper, were simply followed by dilatory recordation or turn-in; (6) they knew the purchase(s) were improper, but intended to reimburse the government the money; (7) they cancelled the transactions; or (8) the government never paid the charges.

1. Cardholder Denies Making the Purchases

Determining the maker of a GPC transaction is a question of fact, which, in the fast-paced world of credit purchases, is increasingly complex. In-store transactions should, of course, yield purchase receipts with signatures, and perhaps eyewitness identification, but the GPC may also be used for on-line buying and telephone orders, making the purchaser's identity more difficult to determine. While cardholders have a duty not to surrender their cards to third persons,¹¹² they must surrender their account number in every lawful transaction, making identity theft a possibility. Identifying the cardholder as the purchaser becomes even more difficult if the program's discipline is lax. Thus, in investigations, admissions by the cardholder are at a premium, and statements to the AO, investigators, or other supervisory personnel, are a crucial source of information. Government counsel should ensure that investigators obtain detailed admissions from persons suspected of misconduct with the GPC. To the extent practicable, investigators should conduct a line-by-line review of purchase receipts with persons suspected of misconduct, obtaining admissions or explanations for specific charges. In the absence of such proof, the defense may challenge the authenticity of any purchase.¹¹³

Government counsel must search for indicators of misconduct outside of the accused's purchases. They should closely scrutinize the cardholder's account reconciliation for relevant evidence. A lengthy period of fraudulent charges with no challenge from the cardholder indicates only one of two possibilities: nonfeasance or malfeasance. The longer the unauthorized purchases continue, the more likely that malfeasance is the cause. Government counsel and investigators should also gather the accused's personal credit transactions, including purchases made before the cardholder obtained the GPC, to identify any similarities in buying patterns. A series of charges to the same or similar vendors may provide strong circumstantial evidence of identity and absence of mistake, grounds for admission under Military Rule of Evidence 404(b).¹¹⁴

109. *Id.*

110. JER, *supra*, note 107, ch. 2, sec. 2635.502, para. 5-301.

111. *Hawkins*, No. 33087, 2000 CCA LEXIS, at *6.

112. *See* ARMY SOP, *supra* note 10, at 4.

113. While questions from the AO may be as simple as, "Did you make these charges," the battle is nevertheless joined: do *Miranda* rights and Article 31 rights apply to such inquiries? When an investigator initiates questioning, it is, of course, potentially for use in legal proceedings against the accused. Yet, when the AO—who is likely the cardholder's immediate supervisor—makes the query, the primary purchase is to maintain proper records. Government counsel should remind AOs that the questions are a regular function of business; i.e., the reconciliation of accounts. Should defense counsel win the race to the witness he or she might get the supervisor to state that the questions were asked primarily to gather evidence, thus requiring a rights warning or proper waiver. When the AO testifies to the cardholder's admissions, counsel should know whether the official spoke to investigators beforehand or asked any questions at their behest.

114. MCM, *supra* note 67, MIL. R. EVID. 404(b).

2. *Cardholder Claims Compliance with or Ignorance of Program Rules*

When the government alleges violations of fiscal guidelines, the trial counsel should expect a challenge from the defense, either on whether the rules were actually violated or on the accused's knowledge of them. The trial counsel should call a witness or witnesses to testify to the rules governing the program, and a finance expert to prove that the funds were actually disbursed. The agency or organization coordinator, for whom monitoring the GPC program is a primary rather than additional duty, is generally a better choice than the AO for testimony about program rules. Therefore, the trial counsel should call the agency or organization coordinator, or a higher official in the GPC supervisory structure, whenever the government needs testimony concerning program rules.

3. *Cardholder Planned to Reimburse the Government*

When cardholders assert that they intended to repay the government for their GPC purchases, they place SOPs (and their knowledge thereof) at issue. In such cases, the absence of a regular reimbursement procedure supports the prosecution, who can use it as circumstantial evidence of intent to defraud the government. If, however, the accused takes the stand at trial, prosecutors would be well advised to avoid posing the ultimate question. If asked how he intended to repay the government without having a regular process to do so, the accused might well respond, "I thought DFAS might just deduct it from my pay." Such a response is, of course, a calculated risk for the defense, but might garner sympathy if the members are unfamiliar with the rules on recovery. At any rate, the government's finance expert should explain that the reimbursement process is a government-initiated process, imposed as a response to improper use of the card, and not at the cardholder's request.

4. *Cardholder Simply Delayed Surrendering the Property*

Prosecutors should also consider charging dereliction of duty whenever the accused ultimately surrenders the property and claims to have simply failed to maintain proper records. The dereliction charge is not superfluous; in difficult cases, such as those in which the property has a military purpose, dereliction may be the only offense of which the accused is convicted. The purchase logs are also essential in proving more serious misconduct, and are the key to detecting inconsistencies between lawful purchases and extraneous charges. Charging dereliction of duty may also eliminate uncharged misconduct issues.

5. *Cardholder Mistakenly Used the Wrong Card*

Although the GPC is prominently marked for official use only, at least one accused has claimed to have mistakenly used it for his personal purchases, actually intending, he asserted, to have used his personal credit card.¹¹⁵ While such a defense might seem spurious, government counsel should be prepared for it. Trial counsel should have an enlarged version of the purchase card available in every contested GPC case to rebut any such assertion from the accused. Government counsel should also include the credit card number on the charge sheet.

As larceny, fraud, and false statements are all specific intent offenses, the defense need only show an honest mistake to obviate criminal intent.¹¹⁶ In anticipation of such a defense, government counsel should subpoena the accused's personal credit card records. While credit card transactions that are the subject of criminal charges will, of course, be absent from the accused's personal credit card statements, confronting her with their absence leaves her in a double bind. She must then explain the conspicuous absence, or at least her lack of any reaction to the unexpected windfall. Her situation becomes even worse if she paid other monthly charges on her personal account. Faced with the absence of the purchases in her personal credit card account records, the accused is left with the highly implausible explanation that she not only failed to keep track of her GPC statements, but her own as well.

6. *Cardholder Cancelled the Purchase*

One can easily envision the scenario in which a cardholder, knowing that investigators are close at his heels, reveals items he purchased but previously withheld, with the explanation, "I just hadn't gotten around to recording the transactions." When the purchases are of impermissible items, this defense is counterintuitive and likely falls flat at trial. One would not expect the cardholder to record, for example, the unauthorized purchase of a diamond ring. But when the items purchased could be used to fulfill legitimate needs, the equation becomes more complicated. In such cases, memoranda, requisitions, or other business records documenting official needs (or the lack of such documents) are valuable evidence. As a preventive law measure, trial counsel should advise commanders to require a memorandum for record from cardholders or AOs *before* major GPC purchases, documenting the unit's need (with major purchases specified at whatever dollar amount the command chooses).

115. See *United States v. Primeau*, 55 M.J. 572 (C.G. Ct. Crim. App. 2001), in which the appellant, a Coast Guard warrant officer, claimed ineffective assistance of counsel after his trial defense counsel failed to call military character witnesses to support a mistake of fact defense. The court was apparently unconvinced remarking, "The evidence of this record convinces us beyond a reasonable doubt that there was no mistake of fact when this experienced warrant officer wrongfully used a Government American Express card to withdraw money from automatic teller machines for unauthorized personal purposes." *Id.* at 573.

116. See generally *United States v. Bankston*, 57 M.J. 756 (Army Ct. Crim. App. 2002).

7. Cardholder Asserts the Government Never Paid for the Purchases

There are, of course, cases in which an accused may assert the absence of payment, either because the government simply did not provide proof, or because the cardholder cancelled the transactions before payment. Such cases may, nevertheless, yield convictions for attempted larceny. When the accused has fraudulently obtained a GPC, the courts have gone so far as to accept a guilty plea to attempted larceny of bank funds even though there was no evidence of a specific transaction.¹¹⁷ The accused may also cancel the transactions and claim the defense of abandonment. When the accused offers such a defense, counsel should determine whether the accused cancelled the transactions of his own accord or in response to potential detection by law enforcement.¹¹⁸

VI. Administrative Responses

A. Military Administrative Actions

For military personnel, administrative actions range from no action, to remedial training, to reprimands or admonitions, to relief for cause, to administrative separations.¹¹⁹ As with all adverse personnel actions, commanders are encouraged to consider all factors involved.¹²⁰

B. Civilian Employee Discipline

As part of the National Defense Authorization Act of 2003, Congress required that agencies establish procedures and issue regulations to address improper use of GPCs by DOD civilian employees.¹²¹ While suspension of employment without pay and termination of employment are authorized measures, agencies must consider the applicable factors listed in *Douglas v. Veteran's Administration*, in every disciplinary case.¹²² Thus, the command should always consider the gravity of the offense,

the purpose of the expenditure, the employee's time in service, and the employee's service record.¹²³

Supervisors imposing disciplinary action against civilian employees should be ready to follow through on any proposed sanctions. If they fail to act decisively, supervisors risk undermining management's authority. Such was the case in *Tackett v. Air Force*, when the Merit Systems Protection Board (MSPB) reversed a removal action after the agency failed to follow its own improvement plan. Tackett, the subject employee, had made numerous unauthorized purchases with the GPC, prompting the agency to issue a written performance improvement plan that made further improper GPC use immediate grounds for termination. Tackett continued making improper charges with the card despite the written warning, but his supervisor responded only with verbal counseling. The agency later made Tackett's GPC misconduct a partial basis for a removal action, which prompted his appeal to the MSPB. The MSPB reversed the removal, essentially ruling that since the government did not find the conduct serious enough to carry through on its ultimatum, neither did the board.¹²⁴

C. Civil Recovery

The Debt Collection Act¹²⁵ provides the authority for collecting debts resulting from improper expenditure of government funds, even when the offender has permanently changed station, retired, or left government service. Certifying officers are subject to pecuniary liability for the fund payments that they approve.¹²⁶ This tool for financial recovery can also serve as a deterrent against negligence by AOs.

The *DOD Financial Management Regulation*, volume 5, chapters 28-32 outline debt collection and recovery. Chapter twenty-eight, the general provision on indebtedness, provides an overview on debt collection and recovery tools for debts owed by both uniformed service members and DOD civilian employees. It states:

117. *United States v. Smith*, 50 M.J. 380 (1999).

118. See generally BENCHMARK, *supra* note 28, para. 5-15.

119. U.S. DEP'T OF ARMY, REG. 600-200, ARMY COMMAND POLICY para. 4-7a (13 May 2002).

120. *Id.*

121. See Department of Defense Appropriations Act for Fiscal Year 2003, Pub. L. No. 107-248, § 8149 (c), (d), 116 Stat. 1519; Bob Stump National Defense Authorization Act of 2003, Pub. L. No. 107-314, 116 Stat. 2458.

122. See Memorandum for Distribution, Under Secretary of Defense, subject: Government Charge Card Disciplinary Guide for Civilian Employees, app. 3 (21 Apr. 2003); *Douglas v. Veteran's Administration*, 5 M.S.P.B. 313 (1981).

123. *Douglas*, 5 M.S.P.B. at 313.

124. *Tackett v. Air Force*, 76 M.S.P.B. 649 (1997).

125. 31 U.S.C. § 3701-11 (LEXIS 2004); *id.* § 3701.

126. *Id.* § 3528.

[D]ebts owed by current or retired members of the military to the DoD or to other federal agencies that can be collected through salary offset shall be collected as provided in Volume 7A, Chapter 50, and Volume 7B, Chapter 28, respectively. Debts owed by current or retired civilian employees to the DoD or to other federal agencies that can be collected through salary or retired pay offset shall be collected as provided in Volume 8, Chapter 8. Debts determined to be owed to the United States that must be collected administratively other than through offset shall be collected under the authority of 31 U.S.C. 3716; and the "Federal Claims Collection Standards," Title 31, Code of Federal Regulations, Parts 900-904, applying the procedures of Volume 5, Chapters 28 through 32.¹²⁷

Measures to enforce debt collection may include: Federal salary offset (including retirement pay); offsets against tax refunds; and litigation. There are provisions for compromise, suspension, and termination of debt collection activity, but such remedies are not available in cases of fraud (as defined by the agency).¹²⁸

VII. Preventing Misconduct

A. Existing Preventive Measures

In response to the numerous reports of misconduct with the GPC, the DOD issued a number of directives aimed at increasing controls over cardholders and reducing misconduct. In March 2002, the Comptroller established a Government Charge Card Task Force to identify problems within the program and to make recommendations to reduce the incidence of inappropriate use. The task force issued its report in June 2002, and suggested twenty-five measures to reduce misconduct with the GPC. Among the task force's suggestions were the following: online statement review for purchase card officials (to defeat alteration of paper copies); improved training; tougher enforce-

ment of the span of control; and more positive control of individuals who depart an installation or activity.¹²⁹ Other improvements, like improved screening of potential cardholders, have already been implemented.¹³⁰ The government is now required to screen potential cardholders and identify bad credit risks, much like civilian credit card agencies.¹³¹

In November 2003, the GAO released an audit guide for investigating misconduct with the GPC and improving internal controls within the program. While the guide was not intended for use in criminal investigations,¹³² it nevertheless contains several measures that may be so used. One such tool is data mining: a computer-assisted method of detecting irregularities in credit card buying patterns, by which financial institutions, persons in the program's supervisory hierarchy, or criminal investigators can set parameters that will electronically flag accounts with suspicious activity.¹³³ The value of data mining as a diagnostic measure cannot be understated—it provides the user with an instantaneous snapshot of a cardholder's purchase activity and provides a constant review over numerous accounts. When combined with other preventive measures, data mining can be an effective means of policing the GPC program, without the need for outside audits. If, for example, the command adopts the aforementioned practice of requiring memoranda to record major purchases at a specific dollar amount (e.g., \$1000) and forwards this information to the installation or MACOM coordinator responsible for reviewing the purchase records, the coordinator can set parameters accordingly and provide the commander with a list of all purchases at or above the amount specified. The commander can then inspect unit records for the memoranda, take corrective action when the documents are missing, and initiate a criminal investigation when warranted.

It is crucial, however, that persons other than the cardholder be notified when data mining identifies a possible discrepancy. In one case from the field, the issuing bank noted several transactions of questionable authenticity and called to confirm their validity. Unfortunately, the call went to the cardholder, the very person committing the purchase card abuse. The cardholder, of course, simply confirmed the transactions. The abuse continued until detected through an unrelated audit.¹³⁴ Since the

127. See DFMR, *supra* note 38, vol. 5, para. 2801(B).

128. *Id.* para. 280103.

129. U.S.DEP'T DEFENSE CHARGE CARD TASK FORCE FINAL REPORT, apps. A, B, 27 June 2002, available at http://www.fmo.navy.mil/docs/DOD_Charge_Card_Final_Report_27_June_2002.doc.

130. *Id.*

131. *Id.*

132. See GAO-04-87G, *supra* note 3, at 6.

133. *Id.*

134. Interview with Lieutenant Commander Russell J. MacFarlane (U.S. Navy), Student 52d Graduate Course, Judge Advocate General's Legal Center and School, Charlottesville, Va. (Nov. 13, 2003).

potential for misconduct is greatest when the cardholder and the AO work in concert to defraud the government,¹³⁵ and since GPC misconduct almost invariably involves either deception of AOs, complicity of AOs, or negligence of AOs, it would be prudent that any programs aimed at detecting abuses involve commanders, who are ultimately responsible for funds and military property within their purview, and who are charged with maintaining unit discipline.

In addition to screening, DOD regulations require reporting of possible Anti-Deficiency Act violations. One who suspects a violation has ten working days to report the violation to his chain of command, which must then appoint an investigating officer.¹³⁶ If the investigating officer suspects criminal misconduct he or she must suspend the investigation and obtain a legal opinion on whether to consult criminal investigators.¹³⁷

The DAU website advises any person who suspects fraud in a GPC account to immediately contact the card-issuing bank, the agency program coordinator, the DOD Fraud Hotline (1-800-424-9098), and the local procurement fraud advisor. Persons suspecting impropriety should also contact their organization's Criminal Investigation Command.

Among the misconduct identified in the GPC program were DOD employees creating or participating in the ownership of outside businesses for the purpose of committing fraud or abuse of the purchase card.¹³⁸ Yet, there is no specific guidance on how to guard against conflicts of interest, other than the training guidance offered at the various websites. As a preventive measure, units might employ conflict of interest disclosure forms for cardholders. The disclosure form can include a pledge to inform the supervisor of any potential conflicts of interest that arise in the future. One further possibility is a simple written declaration from the cardholder, documenting or disclosing personal interest in any businesses with which the cardholder is likely to do business.

B. Does the Military Need a UCMJ Article Addressing GPC Misconduct?

The *MCM* contains no nominate offense for misconduct with the GPC, and the current definition of military property

extends to "all property, real or personal, owned, held, or used by one of the Armed Forces of the United States."¹³⁹ The definition of military property found in the *Benchbook* is even more restrictive, requiring that the property have "either a uniquely military nature or [be] used by an armed force in furtherance of its mission."¹⁴⁰ As has been demonstrated, however, GPC misconduct may involve property with no legitimate military purpose. Moreover, a window of time exists between the transaction and payment, during which the government has only its superior interest in the property as its basis of ownership. This raises the question: does the military need a new UCMJ article to address GPC misconduct?

Military law enforcement officers who have inherent federal authority do not need a new code article to give them greater authority to investigate. If needed at all, a new UCMJ article addressing GPC misconduct would assist prosecutors by closing the evidentiary window, thereby simplifying the exigencies of proof. In its dicta, the *Christy* court discussed the absence of a specific UCMJ article addressing government credit card misconduct, but did not resolve whether a new article was needed.¹⁴¹ Subsequent cases have shown areas of ambiguity in GPC cases that a new definition of military property might cure.

In GPC cases, the area of greatest area of ambiguity is often in characterizing the loss; i.e., determining whether the accused has stolen military funds or property, and if so, when the offense was consummated. Unlike other larceny and wrongful disposition offenses in which the taking of existing property out of the military's possession constitutes the *actus reus*, in a wrongful GPC purchase, the *unauthorized transaction* is the misconduct which converts the merchant's property to military property—the taking is only incidental. A charge of *withholding* military property raises questions concerning remoteness in time from the moment of purchase, to the time when the property should have been surrendered. When cardholders purchase items such as jewelry, which has no military purpose and would likely never be voluntarily surrendered, it is easier to fix the moment of purchase as the time of the offense. Even so, the funds might not yet be disbursed, complicating the situation further. The fact-finder may well be forced to rely on legal definitions as the basis of criminal liability. The analysis in GPC cases can be complex, however, with both trial counsel and the trial judge

135. See, e.g., *United States v. Durant*, 55 M.J. 258 (2001).

136. See DFMR, *supra* note 38, vol. 14, ch. 3, para. 030101; see also FISCAL LAW DESKBOOK, *supra* note 32, ch. 6, at 17 (stating the MACOM usually appoints or approves the investigating officer).

137. See DFMR, *supra*, note 38, vol. 14, ch. 5, para. 050301(E); see also FISCAL LAW DESKBOOK, *supra* note 32, ch. 6, at 17.

138. ARMY SOP, *supra* note 10, at 9.

139. See MCM, *supra* note 67, pt. IV, ¶ 32(c)(1).

140. See BENCHBOOK, *supra* note 28, para. 3-46-1.

141. *United States v. Christy*, 18 M.J. 688, 691 (N.M.C.M.R. 1984).

missing the correct theory. It is noteworthy, for example, that both *Russell* and *Albright* were guilty pleas, both of which left delicate appellate issues for the Army Court and the CAAF. To accomplish its objective in *Russell*, the CAAF had the benefit of the accused's admission that the property could be used by the military. The judges, nevertheless, based their respective opinions on different grounds.¹⁴² Similarly, in *Albright*, the accused admitted that the property became military property upon her purchases,¹⁴³ but the court nevertheless wrestled to define her misconduct. In a contested case before members, defense counsel might capitalize on the ambiguities, perhaps with greater success. Property comprising the subject of Article 108 or 121 offenses might have no legitimate military use, might never have been in the government's possession, or might not have been paid for, providing the defense counsel an opportunity to raise doubts. In such instances, the prosecutor must fill the gaps by showing how the government's contractual obligation vests the Army with the superior right of possession.¹⁴⁴ The case might very well hinge on the instructions given by the military judge. A definition clarifying the nature of property purchased with the GPC could eliminate much of the ambiguity commonly found in such cases. Thus, in contested cases involving GPC misconduct, the trial counsel

should request that the military judge provide the following definition of military property: Military property is all property, real or personal, owned, held, or used by one of the armed forces of the United States, *including all property purchased through the obligation of military funds, regardless of whether the property serves a military purpose, or whether the funds are actually disbursed.*¹⁴⁵

VIII. Conclusion

Accounting for roughly forty-five percent of the federal government's 2002 FY purchase card activity,¹⁴⁶ the DODGPC Program will likely continue to be a cornerstone of military contracting and procurement. The services, therefore, will continue to confront misuse, abuse, and complex fraud within the program. Prosecutors, commanders, administrators, and investigators must take a multifaceted approach involving screening, training, and preventive law. When preventive measures fail, counsel must master the intricacies of GPC cases to advise their commanders and clients, and to prosecute or defend cases effectively.

142. *United States v. Russell*, *United States v. Russell*, 50 M.J. 99 (1999).

143. *United States v. Albright*, 58 M.J. 570, 573 (2003).

144. The term "military property" was not defined in the 1995 *MCM*, which was in effect during *Russell*'s offenses. *Russell*, 50 M.J. at 101 (Gierke, J., concurring). The current benchbook instruction advises the accused commits theft when he wrongfully takes property to which another party has a superior right of possession. See BENCHBOOK, *supra* note 28, para. 3-46-1.

145. Note that this is the author's proposed definition. See generally *Russell*, 50 M.J. at 101; BENCHBOOK, *supra*, note 28.

146. GAO-04-156, *supra* note 2, at 4.